

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of the Village of Spring Valley)	
for a Permit to Abandon the Spring Valley Dam,)	3-WC-94-1081
a.k.a. Handy Andy Park Dam, on the Eau Galle River,)	
Village of Spring Valley, Pierce County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

On January 5, 1995, the Village of Spring Valley applied to the Department of Natural Resources for a permit to abandon the Spring Valley Dam. The Department of Natural Resources issued a Notice of Proposed DNR Permit which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Timely objections were received by the Department.

On February 15, 1996, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice hearing was held on April 25, 1996, in the Village of Spring Valley before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Village of Spring Valley, Applicant, by

Jorv R. Gavic, Attorney
Gavic Law Offices
P. O. Box 400
Spring Valley, WI 54767-0400

Wisconsin Department of Natural Resources, by

Dan Graff, Attorney
P. O. Box 7921
Madison, WI 53707-7921

Gregg Deutsch
137 Stockman Street
Spring Valley, WI 54767

Applicable Law

Section 31.14(2)(a), Stats., provides in relevant part:

(1) It is the policy of this section to preserve public rights in navigable waters, including those created by dams, and to provide a means of maintaining dams and the developments which have been made adjacent to the flowage of such dams.

(2) Except as provided in sub. (3), a permit shall not be granted under s. 31.06, 31.08 or 31.13:

(a) Unless the applicant furnishes to the department proof of ability to operate and maintain the dam in good condition, either by the creation of a special assessment district under ss. 31.38 and 66.60, or by any other means which in the department's judgment will give reasonable assurance that the dam will be maintained for a reasonable period of time not less than 10 years; or

(b) If a majority of the municipalities in which 51% or more of the dam or flowage is or will be located files with the department, prior to the granting of the permit, their objections to the granting of such permit in the form of resolutions duly adopted by the governing bodies of such municipalities.

(3) Subsection (2) does not apply if the applicant complies with each of the following requirements:

(a) Furnishes proof satisfactory to the department that the applicant owns or has an enforceable option to purchase all the land which is or will be flowed by the impoundment, together with the shoreline and an immediately adjacent strip of land at least 60 feet in width, but the department may in a particular case permit a narrower strip where the 60-foot minimum is impractical and may, in furtherance of the policy stated in sub. (1), require ownership of a wider strip.

(b) Files with the department a writing in such form as the department requires in which the applicant agrees that following the initial filling of the proposed pond the applicant will not convey the dam to another without first obtaining department approval. The department may require from an applicant who does not have the power of eminent domain a bond or other reasonable assurances that the applicant will adhere to such agreement.

(c) Furnishes proof satisfactory to the department that the applicant has dedicated or will dedicate a parcel of land for public access to the impounded waters.

(4) No person may assume ownership of a dam after October 21, 1961, or the ownership of that specific piece of land on which a dam is physically located after April 27, 1982, without first complying with sub. (2) or (3). The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located made without complying with sub. (2) or (3) is void unless a permit to abandon the dam was granted under s. 31.185 or unless the transfer occurred by operation of law. Every person who accepts ownership by operation of law is subject to this chapter.

Section 31.185, Stats., provides in relevant part:

(1) No owner of any dam may abandon or remove or alter the dam without first obtaining a permit from the department. No person may transfer ownership of a dam or the ownership of the specific piece of land on which a dam is physically located without first obtaining a permit from the department.

(2) An application for a permit to abandon, remove or alter a dam or an application for a permit to transfer ownership of a dam or the ownership of a specific piece of land on which a dam is physically located shall be made to the department upon forms prescribed by it and shall contain the owner's name and address, a brief description of the dam and its location and other information as the department requires for the purpose of enabling it to act on the application.

(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

Section 710.11, Stats., provides:

Transfer of land where dam exists. A person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14 (4).

FINDINGS OF FACT

1. On January 5, 1995, the Village of Spring Valley (applicant) applied to the Department of Natural Resources (Department) for a permit to abandon and remove the Spring Valley Dam. The dam is located in the NE 1/4, NE 1/4, Section 7, Township 27 North, Range 15 West, Village of Spring Valley, Pierce County, Wisconsin. The applicant

and the Department have complied with all procedural requirements of secs. 31.06 and 31.185, Stats.

2. The Department issued a permit to construct, operate and maintain the dam to Rex Stockman and the Village of Spring Valley on October 15, 1969. The docket number of the permit and order is 3-WR-430. At the time the permit was granted-Rex Stockman owned the land on both sides of the Eau Galle River at the site of the proposed dam.

3. The Spring Valley Dam is located in the Village of Spring Valley on the Eau Galle River. It is approximately eighty feet long and less than ten feet wide. It is constructed of stone and rubble with a concrete top. The dam structure contains five culverts which are 1 1/2 to two feet in diameter. The dam creates an impoundment adjacent to Handy Andy Park.

4. The original purpose of the dam as stated in the order issued in docket number 3-WR-430 was "to create a small impoundment for recreational use by the children of the village and as an aesthetic complement to an adjacent park used by the public."

5. Paragraph nine of the order in docket number 3-WR-430 provides:

The applicants have complied with the requirements of sec. 31.14(2), Statutes, in that one of the applicants is a municipality which now has, and will continue to have, the ability to acquire funds needed to operate and maintain the dam in good condition. In the judgment of the Department, this gives reasonable assurance that the dam will be maintained for a reasonable period, not less than 10 years.

Based on this finding, it is reasonable to infer that the Village of Spring Valley was a co-applicant for the permit to provide the required proof of ability to maintain a dam.

6. On September 4, 1973, Rex Stockman sold the parcel of land along the north side of the Eau Galle River at the dam site to the Village of Spring Valley. This parcel of land has become Handy Andy Park. Rex Stockman subsequently sold the land on the south side of the Eau Galle River at the dam site. The property is currently owned by Gregg and Elizabeth Deutsch. At the time of the real estate transactions, no permit to transfer ownership of the dam was applied for or issued.

7. The Department conducted an inspection of the dam on July 28, 1994. The following deficiencies were noted in the report:

- a. The concrete is badly deteriorated.
- b. Seepage was noted passing through and under the structure.

- c. Erosion was evident at both the abutments.
- d. There was no fence around the structure to prevent access.
- e. There were no portage or warning signs.

8. After the inspection, the Department issued an order (docket no. 3-WC-94-1081) requiring the Village of Spring Valley to reconstruct or apply for a permit to abandon the dam. The estimated cost of removing and replacing the dam is \$57,600.

9. The Village of Spring Valley is the current owner of the dam. The basis for this finding is explained in the "Discussion" section below. The Village of Spring Valley has not indicated a willingness to pay for the repair or removal and replacement of the dam.

10. Since its construction, the dam and the impoundment it has created have provided recreation for the residents, especially children, of Spring Valley. There is strong support for the maintenance of the dam. However, the dam in its present condition is unsafe. The structural condition of the dam itself is deteriorated. Additionally, the dam lacks required safety fencing and signage. (One of the attractions of the dam is its use as a pedestrian bridge to Handy Andy Park. The Department requires fencing to prevent access to the dam. Therefore even if the dam was reconstructed this feature of the dam would be lost.)

11. The proposed abandonment will not adversely affect public rights in navigable waters and will not endanger life, health and property upon compliance with the conditions in the permit. The proposed abandonment will not be detrimental to the public interest in the waters of the Eau Galle River.

12. The proposed abandonment will not adversely affect water quality nor increase water pollution in the Eau Galle River. It will not cause environmental pollution as defined in sec. 144.01(3), Stats., upon compliance with the conditions of the permit.

13. The Department had made an environmental assessment of the project and has concluded that the grant or denial of the permit requested would not constitute a major state action significantly affecting the quality of the human environment.

14. The public hearing on the proposed abandonment of the Spring Valley Dam was conducted on April 25, 1996. Opposition to the proposed abandonment was not withdrawn. Therefore, in accordance with sec. 31.185(4), Stats., the Division of Hearings and Appeals has deferred action on the application for more than 120 days. No municipality, person or association has agreed to accept transfer of ownership of the dam since the close of the hearing.

DISCUSSION

At the hearing and in written argument filed subsequent to the hearing, the Village of Spring Valley (Village) contended it is not the owner of the Spring Valley Dam. The Village contends that Rex Stockman transferred only the land on the north side of the Eau Galle River to the Village, not ownership of the dam. Based on the evidence in the record, I find that the Village of Spring Valley is the owner of the dam. The Village was a co-applicant for the permit to construct, operate and maintain the dam and owns the property along the north side of the Eau Galle River at the dam site.

Rex Stockman testified at the hearing, that at the time he sold the land on the north side of the Eau Galle River at the dam site to the Village, it was his intention to also transfer ownership of the dam. The Village contends that it has never taken responsibility for maintaining the dam and this shows that it was not the Village's intention to accept ownership of the dam at the time the property was transferred. However, the Village did file an application for a permit to abandon the dam. Such an application can only be filed by an owner of a dam; therefore, on at least this one occasion, the Village has acted as the owner of the dam.

The Village suggests that the owner of the residential real estate on the south side of the Eau Galle River at the dam site should be considered the owner of the dam. The basis for this contention is that the owner of the residential property has historically maintained the dam. Testimony at the hearing was that the documents transferring the interests in this real estate have not transferred ownership of the dam. Pursuant to sec. 710.11, Stats., "[a] person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14(4)."

Section 31.14(4), Stats., in turn provides that "[no] person may assume ownership of a dam after October 21, 1961, or the ownership of that specific piece of land on which a dam is physically located after April 27, 1982, without first complying with sub. (2) or (3). The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located made without complying with sub. (2) or (3) is void unless a permit to abandon a dam was granted under s. 31.185 or unless transfer occurred by operation of law. Every person who accepts ownership by operation of law is subject to this chapter." There is no evidence that any of the owners of the residential real estate subsequent to Rex Stockman complied with the provisions of sec. 31.14(4), Stats. Accordingly, Gregg and Elizabeth Deutsch, the current owners of the residential property, cannot be owners of the dam.

The order granting the dam permit specifically finds "the applicants have complied with the requirements of sec. 31.14(2), Stats., in that one of the applicants is a municipality, which now has, and will continue to have, the ability to acquire funds needed to operate and

maintain a dam in good condition. In the judgement of the Department, this gives reasonable assurance that the dam will be maintained for a reasonable period, not less than ten years." As stated above, the order granting the permit to construct, operate and maintain the dam specifically found that the Village has complied with requirements of sec. 31.14(2), Stats. Moreover, as a municipality, the Village is not subject to the provisions of sec. 710.11, Stats. Under the circumstances, the Village is the owner of the Spring Valley Dam.

Gregg Deutsch argues that the Village should be given the option of repairing the existing dam, in addition to removing and reconstructing the dam or abandoning the dam. Although not stated in the Department's order, this option is available to the Village. Essentially the Village has the option of maintaining a dam in good repair and condition, either by repairing the existing structure or removing and reconstructing it, or abandoning the dam. The record does not include a reliable estimate for the cost of repairing the existing structure; however, based on the engineering studies, it was determined that it was more cost effective to remove and reconstruct the dam than to repair the existing structure. If it was subsequently determined that the existing structure could be brought up to good repair and condition, this certainly is an available option for the Village.

The Village, as the owner of the dam, has determined that it is preferable to abandon the dam rather than to bring the structure into good repair and condition and has filed an application for a permit to abandon the dam. The issue for the hearing is whether the proposed abandonment of the Spring Valley Dam is in the public interest. Considering the unsafe condition of the present dam, the abandonment of the dam is in the public interest. Repair or reconstruction of the dam may also be in the public interest considering the recreational and aesthetic values of the dam. However, the owner cannot be required to bear the expense of making this dam safe if it prefers to abandon the dam.

Finally, Mr. Deutsch argues that the Department should only require that the dam be brought up to the standards in place at the time it was constructed, not current standards. With respect to the dam structure itself, the Department only required that the dam be brought up to good repair and condition. This standard has not changed since the dam was constructed. The only requirements that may have been added since the construction of the Spring Valley Dam are signing and fencing requirements. The safety requirements apply to all dams, including those in existence at the time that the requirements were promulgated. Additionally, the costs of signing and fencing are insignificant relative to the cost of repairing or reconstructing the dam.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 227.43 and 31.185, Stats., and in accordance with the foregoing Findings of Fact, to grant a permit to abandon the Spring Valley Dam as herein described, subject to the conditions contained in

the order. Hearing in this matter was held on April 25, 1996. Pursuant to sec. 31.185(4), Stats., the Administrative Law Judge deferred issuing the Order until after August 25, 1996, to allow a period of 120 days for any municipality or other persons or associations an opportunity to acquire ownership of the dam. No such municipality, persons, or organization have made themselves known to the Administrative Law Judge.

2. Pursuant to sec. NR 150.03(8)(f)7.d, Wis. Adm. Code, abandonment of a dam is a type III action. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, a permit to abandon the Spring Valley Dam on the Eau Galle River, Village of Spring Valley, Pierce County subject: however, to the following conditions:

1. This permit expires one year from the date of its issuance if the project is not completed before then. No work may begin or continue after this date unless a new permit or a permit extension is granted in writing by the Department.

2. The permittee shall submit plans for abandonment of the dam and restoration of the dam site for approval by the Department. No work or removal shall commence until the plans have been approved by the Department.

3. The entire dam structure shall be removed. This includes, but is not limited to, the concrete, culvert pipes, rock fill, piling (to below the anticipated stream bed elevation) if any, steel reinforcements and earthen fill materials.

4. Sediment transport will be addressed once the pond is drawn down and the extent of the deposits are better known.

5. Standard construction site erosion control measures must be specified and enforced.

6. Streambank stabilization will be addressed by fisheries personnel at the time of the removal.

7. The waterway for flow and navigation in the vicinity of the structure shall be restored as nearly as practicable to its conditions prior to the original construction of the dam.

8. The permittee shall waive any objection to the free and unlimited access to the project site at any time by any Department employee who is investigating the project.

9. The authority granted herein can be amended or rescinded if the project obstructs navigation or becomes detrimental to the public interest or if necessary to protect the environment.

10. The permittee shall provide a copy of this permit to its contractor and keep a copy at the project site at all times until the project has been completed.

11. The permittee shall notify the Western District, Eau Claire Area Office of the Department of Natural Resources in writing not less than ten days prior to commencing the abandonment and again not more than ten days after completion.

12. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

13. Acceptance of this permit shall be deemed acceptance of all conditions herein.

Dated at Madison, Wisconsin on September 12, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.